Supreme Court, U.S.
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No. 94-1972

In The

Supreme Court of the United States

October Term, 1994

CARL FOSTER,

Petitioner,

v.

NORTHWESTERN ELECTRIC COOPERATIVE, INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The Oklahoma Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is the Oklahoma Court of Appeals Division III holding reversing the Harper County District Court's order overruling Respondent's motion for new trial and remanding to the Harper County District Court for further proceedings consistent with its opinion a "final judgment" for purposes of 28 U.S.C. § 1257?

PARTIES

Petitioner, Carl Foster, is an individual.

Respondent, Northwestern Electric Cooperative, Inc. is a cooperative corporation organized pursuant to the Rural Electric Cooperative Act, 18 O.S. §§ 437 et seq.

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TO THE HONORABLE SUPREME COURT:

Respondent, **Northwestern Electric Cooperative, Inc.**, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, **Carl Foster**.

OPINIONS BELOW

This case has its origin in the District Court of Harper County, Oklahoma. On November 9, 1990 a jury returned a verdict in favor of Petitioner for damages in the sum of $912.00 and judgment was accordingly

entered. On February 12, 1991 the District Court of Harper County, Oklahoma entered its order overruling the motion of Respondent for a new trial. Respondent appealed to the Oklahoma Supreme Court which assigned the case to the Court of Appeals Division No. III ("the Court of Appeals.")

On September 15, 1992 the Court of Appeals entered its order reversing the trial court and remanded the case back to the District Court of Harper County for further proceedings consistent with its opinion. Petitioner's Petition for Rehearing was denied. On March 23, 1993 the Oklahoma Supreme Court granted Petitioner's Petition for Writ of Certiorari. However, on March 6, 1995 the Oklahoma Supreme Court entered an order recalling its previous order granting the writ of certiorari.

STATEMENT OF THE CASE

On December 6, 1988 Respondent entered into a contract to provide electrical services to a customer. The contract necessitated construction of the line over a portion of Petitioner's land. Prior to construction Respondent had numerous discussions with Petitioner concerning the location of the line across his land and obtained his consent to survey proposed routes. One of the proposed construction locations was along a road ("the road") crossing Petitioner's property.

The road was constructed by the county in 1925 and is similar to other county roads in the area. Due to the steep canyons and ravines, the road takes the path of least resistance between the canyons and ravines and is

located west of the east boundary line of Petitioner's property. The road as constructed is a part of the county road system and is approximately 12 miles in length. Since construction of the road, it has been open to general public vehicular traffic and is characterized as a "minor collector" by the Oklahoma Department of Transportation and the official road maintenance map of the Harper County Commissioners.

On March 7, 1925 the Commissioners of Harper and Woodward County entered into a joint agreement that Woodward County would maintain the South 6 miles of the road and Harper County would maintain the North 6 miles of the road. Petitioner has never protested that the road has been maintained with public funds and public property since 1925.

Prior to construction of the line, Respondent requested permission from the Harper County Commissioners to construct the line within the road right-of-way. On April 3, 1989 the Harper County Commissioners voted that they had no objection to Respondent "running a new electric line across (Petitioner's property)".

Respondent again appeared before the Commissioners on April 25, 1989 and specifically requested consent to construct the line within the right-of-way along the road crossing Petitioner's property. The Commissioners found that Respondent had complied with all rules and regulations and ratified their earlier consent. The Commissioners consented to the erection and maintenance of Respondent's line under the road and within the road right-of-way.

Because construction of the line would cross real property owned by people other than Landowners, Respondent appeared before the Commissioners, on May 1, 1989, and requested consent to construct the line along the right-of-way of the road as it crossed all applicable Harper County real property. The Commissioners unanimously consented to construction of the line on the condition that construction was not closer than 25 feet from the roadway centerline. Consequently, Respondent completed construction of the line.

On April 10, 1989 Respondent filed its claim against Petitioner praying for a temporary and permanent injunction against Petitioner to preclude him from interfering with Respondent's construction of an electrical distribution line ("the line") within the right-of-way of a county road that crossed Petitioner's property. Thereafter, Petitioner filed his claim against Respondent praying for a temporary and permanent injunction against Respondent to preclude Respondent from constructing the line on any portion of his property. On April 14, 1989 the trial court entered an order consolidating all claims involving Petitioner and Respondent into one action. Subsequently, Petitioner filed his counterclaim for damages.

On November 9, 1990 a jury returned a verdict in favor of Petitioner and judgment was accordingly entered in favor of Petitioner as follows: (1) Judgment in favor of Petitioner and against Respondent for damages in the sum of $912.00; and (2) Respondent's temporary injunction which had precluded Petitioner from interfering with the erection, maintenance and installation of the line

within a 25 feet right-of-way from the center of the traveled portion of the public road was dissolved. Respondent was further ordered to remove the line from the real property owned by Landowners. Respondent's motion for new trial was overruled.

On September 15, 1992 the Court of Appeals entered its order reversing the trial court and remanded the case back to the District Court of Harper County for further proceedings consistent with its opinion. The Court of Appeals entered three specific holdings on appeal. First, the Court of Appeals held that this case "was one in equity and it remained essentially an equitable matter" thus Petitioner was not entitled to a jury trial. The second, but pivotal issue resolved by the Court of Appeals was the status of a road which crosses land owned by Petitioner. Was the road "public" or "private"? The Court of Appeals held:

> **We specifically find that the road in question is a public road, maintained by Harper County and over which the Commissioners of Harper County have jurisdiction to grant permission for use by public utilities. The jurisdiction of the County includes the road, its rights-of-way and any existing easement.**

The Court specifically found the road in question to be a "public road" which is defined by 69 O.S. § 232 as follows: "A road constructed to connect other public roads or streets, but not connected to the highway." The Court of Appeals cited 69 O.S. § 1401 which provides in part:

> The use of the **public roads** and highways by such public utilities . . . shall be for the purpose

> of erecting poles and posts, attaching equipment, wires and fixtures thereto . . . Such poles, wires, fixtures, pipes and conduits shall be erected, placed, adjusted or laid and maintained only after obtaining the consent of, and under such rules and regulations as shall be prescribed by, . . . the boards of county commissioner of the various counties as to roads and highways under their jurisdiction.

The Court of Appeals further held: "We find the trial court abused its discretion in fashioning the injunctive relief, and that its order requiring the dismantling of all poles and lines is not supported by the evidence. *Board of Regents v. Nat'l Collegiate Athletic Ass'n*, 561 P.2d 499 (Okla. 1977). The evidence does not reveal that (Petitioner) carried (his) burden of showing a need for the extraordinary remedy of injunction. *Amoco Production Co. v. Lindley*, 609 P.2d 733 (Okla. 1980)."

SUMMARY OF THE ARGUMENT

This Court is without jurisdiction at this time. No **final judgment** has been rendered by the highest court of Oklahoma.

REASONS FOR DENYING THE WRIT

The Court of Appeals reversed the trial court's order denying Respondent's motion for new trial and remanded the case for further proceedings consistent with its opinion. No final judgment has yet to be entered by the highest court of Oklahoma. Petitioner has cited 28

U.S.C. § 1257 as the jurisdictional springboard to this Court, but it avails him not. 28 U.S.C. § 1257 provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any privilege, or immunity is specially set up or claimed under the Constitution of . . . the United States.

NO FINAL JUDGMENT HAS BEEN ENTERED THUS PRECLUDING FEDERAL APPELLATE JURISDICTION

This Court has repeatedly held that its appellate jurisdiction is regulated by 28 U.S.C. § 1257. "Since 1789, Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a 'final judgment or decree.' Title 28 USC § 1257 [28 USCS § 1257] retains this limitation on our power to review cases coming from state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-477 (1975).

As with any rule it is not meant to be rigid and a few specific exceptions have been created. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). Merely because further proceedings are to be conducted in the lower state court does not necessarily preclude review by this Court on the jurisdictional grounds of lack of a "final judgment."

Before jurisdiction is present to allow this Court appellate review both the issue of whether a taking has occurred and a failure of just compensation must have been decided by the state's highest court. " . . . the federal

constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973). Here, Respondent complied with all applicable laws of the State of Oklahoma. Respondent specifically sought permision from the Harper County Commissioners to construct the line along the road. Under Oklahoma law county commissioners have exclusive jurisdiction to permit utilities to use public roads. Respondent had complied with every rule and regulation of the Harper County Commissioners who authorized construction not closer than twenty-five (25) feet from the public roadway center.

In *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 632-633 (1981) this Court dismissed a petition for certiorari holding in part:

> Ever since this Court's decision in *Grays Harbor Co. v. Coats-Fordney Co.*, 243 U.S. 251 (1917) a state court's holding that private property has been taken in violation of the Fifth and Fourteenth Amendments and that further proceedings are necessary to determine the compensation that must be paid has been regarded as a classic example of a decision not reviewable in this Court because it is not "final." In such a case, the "remaining litigation may raise other federal questions that may later come here."

The Statutes of the United States as well as this Court's prior case law have defined the limits of this Court's appellate jurisdiction. Petitioner has failed to establish the jurisdictional prerequisite of a final judgment to empower this court's appellate jurisdiction.

CONCLUSION

Respondent, Northwestern Electric Cooperative, Inc., respectfully submits that no final judgment has been entered at this time by the Courts of Oklahoma. Consequently, the Petition for a writ of certiorari as filed herein by Petitioner, Carl Foster, is jurisdictionally defective and should be denied.

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APPENDIX A

69 O.S. § 232 **Public Road**

A road constructed to connect other public roads or streets, but not connected to the highway.

69 O.S. § 1401. **Use of highways, rights-of-way and easement by public utilities and cable television system – Consent, terms and conditions**

(a) Any public utilities or cable television system, not otherwise authorized to do so, lawfully operating or doing business in the State of Oklahoma shall have the right to use the public roads and highways of this state, including the right-of-way and all easements pertaining thereto, as hereinafter provided.

(b) The use of the public roads and highways by such public utilities or cable television system shall be for the purpose of erecting poles and posts, attaching equipment, wires and fixtures thereto and laying pipes and conduits under the surface thereof. Such poles, wires, fixtures, pipes and conduits shall be erected, placed, adjusted or laid and maintained only after obtaining the consent of, and under such rules and regulations as shall be prescribed by, the Commission as to the state highway system, and the boards of county commissioners of the various counties as to roads and highways under their jurisdiction. Provided, that nothing herein shall be construed to grant the right to use the streets or other places of any municipality of this state without the consent of such municipality. Provided, further, that the boards of county commissioners may grant to any citizen the right to lay pipes and conduits under the surface of any road

or highway under their jurisdiction, subject to such rules, regulations and conditions as shall be prescribed by the board of county commissioners. Provided, further, that nothing herein shall be construed to limit any rights granted by other provisions of law. Provided, further, that such poles, wires, posts, conduits and equipment shall be erected, placed, adjusted, laid, constructed and maintained so as not to incommode or endanger the public in the use of its roads and highways.

Public utilities or cable television systems shall completely repair or replace any damage, injury or other change to public roads or highways of any county or municipality which would incommode or endanger the public which are caused by the erection, placement, adjustment, construction or maintenance of any public utility or cable television system poles, wires, posts, conduits or other equipment. Provided that nothing in this act shall be interpreted to impair the right of recovery against any third party for such damage or injury.

(c) The failure of any such public utility or cable television system to construct or maintain its poles, wires, conduits, pipe lines and equipment upon or under such public highways in full compliance with the rules and regulations promulgated by the Commission or the board of county commissioners involved shall forfeit the right of such utility or cable television system herein granted to use such public highway or highways, and such utility or cable television system may thereupon be ousted from the use of such highway.

28 U.S.C. § 1257 **State courts; certiorari**

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.